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May 19, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

**Re: GN Docket No. 93-252**
**Regulatory Treatment of Mobile Services**

Dear Mr. Caton:

On behalf of CUE Network Corporation, we hereby submit an original and eleven copies of its Petition for Clarification and/or Reconsideration in connection with the above-captioned docket.

Should any questions arise concerning this matter, kindly contact the undersigned.

Sincerely,

Gregg P. Skall

Enclosure

cc: Mr. Gordon Kaiser

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of | ) | |
| Sections 3(n) and 332 of the | ) | GN Docket |
| Communications Act | ) | No. 93-252 |
| | ) | |
| Regulatory Treatment of Mobile Services | ) | |

To: The Commission

**PETITION FOR CLARIFICATION AND/OR RECONSIDERATION**

CUE Network Corporation ("CUE"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby requests the clarification and/or reconsideration of the Commission's decision in the above-captioned docket, as set forth in the Second Report and Order (the "Order"), FCC 94-31 (released March 7, 1994), 59 Fed. Reg. 18496 (April 19, 1994).

The issue addressed by this Petition results from the apparent unintentional equation of the word "authorization" with the term "licensee" in the distillation of the Report and Order into the specific language of Rule Section 20.5(a). It is an issue of importance to CUE, which is therefore seeking relief as requested herein.

## I. BACKGROUND

In the Order, the FCC determined that, pursuant to amendments to the Communications Act of 1934, as amended (the "Act"), made by the Omnibus Budget and Reconciliation Act of 1993 (the "Budget

Act"),[1/] a number of mobile services that previously had been treated as private carrier services would be reclassified as commercial mobile radio services ("CMRS"), and would become subject to common carrier regulation, after the expiration of a statutory transition period. With respect to services provided over the subcarriers of FM radio stations, the Commission concluded that those services "that meet the definition of CMRS but have been regulated as private radio services, will . . . [become] subject to CMRS rules." Order, ¶ 260.

CUE provides paging, messaging and other services over FM subcarriers on a private carrier basis, as permitted by the Commission's Rules. See 47 C.F.R. § 73.295(b). Some of these services appear to meet the definition of CMRS. See 47 C.F.R. § 20.9(a)(12). Thus, CUE and other FM subcarrier paging providers will become subject to Title II common carrier regulation at the end of the statutory transition period, i.e., on or after August 10, 1996. See Order ¶ 260.

Appendix A to the Order sets forth the new regulations to implement the Commission's decision. At Section 20.5, the Commission appears inadvertently to have created an ambiguity in the application of an element of Title III regulation, relating to the foreign ownership limitations of Section 310(b) of the Act. The first sentence of new Section 20.5(a) of the FCC's Rules, 47 C.F.R. § 20.5(a) states that the rule "implements Section 310 of the Communications Act, 47 U.S.C. § 310, regarding the citizenship of

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1/ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(c), 107 Stat. 393 (1993).

licensees in the commercial mobile radio services" (emphasis added). The second sentence of the rule, however, which contains the specific foreign ownership limitation, refers more broadly to "[c]ommercial mobile radio service authorizations" (emphasis added).

This apparently unintentional equation of the word "authorization" with the term "license" could have serious consequences for firms, that have foreign ownership in excess of the limits set forth in Section 310(b) of the Act, 47 U.S.C. § 310(b). Although these firms lease FM subcarriers from broadcast licensees, they do not themselves hold station licenses. Section 310(b) has not ever been applied to such firms.

Because CUE, as a commercial mobile radio service provider, will have to seek FCC "authorizations" (but not licenses) for much of its operations, see 47 C.F.R. § 73.295(b), it could now be viewed as subject to the foreign ownership restrictions of the Act -- based solely on the FCC's use of the word "authorizations," rather than the word "licenses." Since CUE leases FM subcarriers from broadcast licensees and does not become a station licensee itself, Section 310 has never been applied to it. Nothing in the Report and Order suggests there should be a change in that status. Accordingly, believing that this use of "authorizations" was inadvertent in the context of Section 310(b), CUE seeks a change in the word "authorizations" in Section 20.5(a) of the Rules, or alternatively, FCC clarification regarding the non-applicability of Section 310(b) of the Act to FM subcarrier services.

## II. THE FOREIGN OWNERSHIP RESTRICTIONS WERE NOT INTENDED TO, AND SHOULD NOT, APPLY TO THOSE LEASING FM SUBCARRIERS AND HOLDING NO FCC LICENSE

Section 310(b), by its terms, applies only to radio station licenses;[2/] it does not restrict the extent to which FCC-licensed facilities may be used by aliens who are not themselves licensees. Because of this distinction between licensees and users of licensed facilities, the Commission has long held that the foreign ownership restrictions do not apply to parties that merely lease capacity from FCC licensees.[3/]

The lessee of an FM subcarrier does not hold a Title III license and has no FCC-granted right to use the radio spectrum, but is instead entirely dependent on a contract with the FM station. The FM station licensee remains solely responsible for the operation of the FM facilities and for complying with the requirements of Title III, including Section 310. See 47 C.F.R. § 73.295(c).[4/] In discussing common carrier authorizations for FM subcarrier services,

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2/ Section 310(b), 47 U.S.C. § 310(b), reads, in relevant part:

> "No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by . . . ." 47 U.S.C. § 310(b) (emphasis added).

3/ See, e.g., Satellite Business Systems, 95 FCC 2d 866, 873 & n.7 (1983); Satellite Transponder Sales, 90 FCC 2d 1238, 1257-58 & n.46 (1982), aff'd sub nom. Wold Communications v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

4/ If the FM station loses its license, the FM subcarrier lessee's right to use the subcarrier also terminates. See SCA Order, 53 R.R.2d at 1526 & n.13 ("[t]he Commission regards FM subcarrier use as a secondary privilege that runs with the primary FM station license").

moreover, the Commission made clear that FM subcarrier users "would not be seeking approval for the technical facilities of the FM station or the subchannel"; rather, "only the use of the subchannel for nonbroadcast related purposes would be regulated in accordance with private radio or common carrier regulations." SCA Order, 53 R.R.2d at 1526 (emphasis added).

Perhaps the clearest example of the Commission's longstanding interpretation of the application of Section 310 to FM subcarriers lies in the instructions for Form 401, which FM subcarrier providers must submit to the FCC to obtain common carrier authorization. These instructions state that subcarrier applicants need only complete certain items on the form, specifically not including item 12, which concerns compliance with Section 310(b).[5/]

This longstanding FCC policy on FM subcarrier services and Section 310(b) was not changed by the passage in 1993 of the Budget Act. Congress recognized that the statute would be "broaden[ing] the range of services subject to limitations on foreign investment," see H. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 495 (1993), but it also made clear that the "amendments in no way affect the Commission's authority under Section 310(b)." Congress did not purport to change the fundamental requirement of Section 310(b):

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5/ The initial Public Notice that announced these instructions stated that this question should be marked "not applicable" for FM Subcarriers. FCC Will Accept FM Subchannel Applications for Common Carrier Services, No. 1754, at 2 (Jan. 10, 1984); see 55 R.R.2d at 1618 (noting that modified instructions to FCC Form 401 had been released that "take into account the unique aspects of [common carrier] services offered on FM subcarriers").

that the statute's provisions apply only to those holding FCC "licenses."

## III. CONCLUSION

Petitioner believes that the Commission did not intend to make any revisions to the scope of Section 310 through its implementation of the Order. To avoid potential confusion regarding the applicability of Section 310 to FM subcarriers, CUE respectfully requests that the Commission change Section 20.5(a) of the Rules by replacing the word "authorizations" in the second sentence with the word "licenses." Alternatively, the Commission should reiterate its guidance that Section 310(b) applies only to Title III licensees, and not to those holding FM subcarrier authorizations pursuant to Title II.

Respectfully submitted,

**CUE NETWORK CORPORATION**

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